

124 FERC ¶ 61,254
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Duke Energy Carolinas, LLC

Project No. 2602-023

ORDER DENYING MOTION FOR STAY

(Issued September 18, 2008)

1. On July 19, 2007, the Commission granted the application of Duke Energy Carolinas, LLC (Duke) for surrender of its license and removal of the project works for the 225-kilowatt Dillsboro Hydroelectric Project No. 2602, located on the Tuckasegee River in Jackson County, North Carolina.¹ On August 12, 2008, Jackson County, North Carolina filed a motion requesting a stay of all approvals and activities associated with the project's removal, pending the completion of judicial and administrative proceedings. In this order, we are denying the stay request, because the public interest would be best served by allowing Duke to move forward with surrender and dam removal activities without delay.

Background

2. The Dillsboro Project includes a 12-foot-high, 310-foot-long concrete masonry dam, which impounds a 0.8-mile-long, 15-acre reservoir, and a 77-foot-wide by 43-foot-long by 43-foot-high powerhouse. Since 1980, the project has been operated by Duke and its predecessor, Nantahala Power and Light Company, under an original license that expired in 2005. In May 2004, Duke filed an application to surrender the Dillsboro license. Numerous federal and state resource agencies, local governmental entities, non-governmental organizations, tribes, and other groups supported the surrender and project removal as the best use of the waterway.

3. In the July 19 Order, we accepted Duke's proposal for surrender and authorized removal of the project facilities subject to certain conditions. We concluded that removal of the Dillsboro dam and powerhouse would benefit environmental resources in the Tuckasegee River and would be in the public interest. We based our conclusion on the environmental assessment (EA) that Commission staff prepared, which found that the dam's removal would restore natural conditions within an 0.8-mile segment of the Tuckasegee River, open up nearly one mile of free-flowing river, expand available

¹ *Duke Energy Carolinas, LLC*, 120 FERC ¶ 61,054 (2007) (July 19 Order).

habitat for native fish, increase angling opportunities, provide unobstructed, public access to 9.5 miles of river, and enhance whitewater boating and canoeing opportunities in the area, all without causing significant adverse effects.

4. Based on staff's Biological Assessment, included in the EA, and the Biological Opinion issued by the U.S. Fish and Wildlife Service (FWS), we concluded that surrender of the Dillsboro license and removal of the project works would not be likely to adversely affect the endangered Appalachian elktoe mussel or the endangered Indiana bat. FWS found in its Biological Opinion that incidental take of the endangered Appalachian elktoe mussel may occur as a result of demolition activities associated with the decommissioning and removal of the Dillsboro Dam, but concurred with staff's conclusion that, with the measures identified in staff's EA, project removal would not be likely to jeopardize the continued existence of the Appalachian elktoe mussel or adversely affect or destroy its critical habitat.² Accordingly, we required Duke to complete removal of the dam and powerhouse and site monitoring within three years of the order's issuance date, and to do so in a manner that adequately protects the endangered Appalachian elktoe mussel consistent with the Incidental Take Statement provided by FWS.³

5. Duke plans to remove the project dam and powerhouse in three stages, which entail: demolition of the powerhouse superstructure,⁴ at an as-yet unspecified date; dam demolition and removal beginning in January 2009 and ending in March or early April; and demolition of the powerhouse substructure,⁵ at an as-yet unspecified date following dam removal.

6. On August 20, 2007, Jackson County, joined by several municipal and local entities (community parties)⁶ filed a request for rehearing of the July 19 Order. The

² The FWS agreed that license surrender and project removal would not be likely to adversely affect the Indiana bat.

³ The Incidental Take Statement is attached to FWS' Biological Opinion for the Dillsboro Project and can be found in Appendix B to the surrender order.

⁴ The superstructure includes the portions of the powerhouse that are above water, such as the walls and roof.

⁵ The substructure refers to the portion of the powerhouse that is below water, and includes the project's turbines, generators, and concrete flumes.

⁶ Jackson County was joined by Macon County, North Carolina; the Town of Franklin, North Carolina; the Friends of Lake Glenville Association, Inc.; T.J. Walker; the Dillsboro Inn; and the Western North Carolina Alliance. Timely requests for rehearing and clarification were also filed by Duke, the U.S. Department of the Interior,

community parties challenged the surrender order on several grounds, arguing *inter alia*, that the Commission erred in accepting a procedurally-defective water quality certification issued by the North Carolina Division of Water Quality (North Carolina DWQ) on March 17, 2005, and in concluding that the certification authorized removal of the project dam and powerhouse.⁷ We rejected the community parties' arguments and upheld the surrender and project removal in our order on rehearing, issued April 22, 2008.⁸ As to the community parties' argument regarding water quality certification, we found that any defect in the March 2005 certification was cured by a subsequent certification issued on November 18, 2007, which contained additional, more detailed requirements for dam removal and monitoring.⁹

7. Jackson County filed a state-level administrative appeal of the 2005 and 2007 water quality certifications, and a petition for judicial review of the Commission's July 19 and April 22 Orders.¹⁰ In its motion for stay, Jackson County asks that the Commission stay demolition activities and related approvals pending a court decision on its petition and administrative action on its challenge of the water quality certifications. On August 26, 2008, Duke filed an answer in opposition to Jackson County's motion for stay, asking that the Commission deny the request as unjustified, or in the alternative grant a limited stay of dam and powerhouse removal activities only.¹¹

and the North Carolina Wildlife Resources Commission (North Carolina WRC). On August 20, 2008, T.J. Walker filed a notification that it has settled its dispute with Duke and is withdrawing from all proceedings related to the license surrender.

⁷ Jackson County also argued that the environmental analysis in staff's EA and FWS' Biological Opinion was factually and analytically flawed and that the Commission failed to consider reasonable alternatives to license surrender.

⁸ *Duke Energy Carolinas, LLC*, 123 FERC ¶ 61,069 (2008) (April 22 Order).

⁹ A copy of the water quality certification is attached as an appendix to the April 22 Order.

¹⁰ Jackson County's administrative appeal is pending before the North Carolina Office of Administrative Hearings. Jackson County's petition for judicial review, filed jointly with the Town of Franklin, North Carolina, and the Friends of Lake Glenville Association, Inc., is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit (Docket No. 08-1224).

¹¹ American Whitewater also filed an answer opposing Jackson County's motion, on August 27, 2008.

Discussion

8. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act,¹² i.e., that a stay will be granted if the Commission finds that “justice so requires.”¹³ Under this standard, we generally consider such factors as whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay would substantially harm other parties, and where the public interest lies.¹⁴

A. Commission’s July 19 and April 22 Orders

9. Jackson County contends that both the county and citizens it represents will suffer irreparable harm if the Commission’s July 19 and April 22 Orders are not stayed, because removal of the dam and powerhouse will permanently alter the physical and historic landscape of the local community.¹⁵

10. Jackson County has not demonstrated that it will suffer irreparable harm if its stay request is denied. As explained in our orders, removal of the project dam and powerhouse will not result in any significant, adverse impacts. Moreover, dam removal is not irreparable. Once the license has been surrendered and the dam removed, the County or other parties may seek to acquire the former project site -- which will no longer be within our jurisdiction -- and make whatsoever use they choose of it, including building a new dam. While building a new dam might be more expensive than retaining the existing structure, nothing we do here would preclude such an action. With respect to any potential expense, we have previously explained that pecuniary loss, without more, does not constitute irreparable harm.¹⁶

11. In addition, granting a stay could cause undue delay. Before demolition can begin, Duke is required to fulfill several conditions to effectuate the surrender, including

¹² 5 U.S.C. § 705 (2000).

¹³ See *John C. Jones*, 100 FERC ¶ 61,165, at P 4 (2002); *Clifton Power Corporation*, 57 FERC ¶ 61,055, at 61,219 (1991); and *Rough and Ready Hydro Company*, 80 FERC ¶ 61,170, at 61,722 (1997).

¹⁴ See, e.g., *Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

¹⁵ Jackson County asserts that removal of the project works would deprive local businesses and recreationists of the recreation uses and benefits of the impoundment and area below the dam, including swimming, fishing, and tourism.

¹⁶ See *FPL Energy Maine Hydro, LLC*, 124 FERC ¶ 61,027, at P 19 (2008); and *Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 11 (2005).

developing a removal schedule; preparing and filing plans;¹⁷ completing studies; and removing approximately 70,000 cubic yards of sediment from the reservoir. The removal of project facilities authorized by the surrender order is also subject to the conditions of the 2007 water quality certification and the Incidental Take Terms and Conditions issued by FWS on August 14, 2006.¹⁸ Perhaps more important, a stay pending judicial and administrative review would delay Duke's project removal and thereby delay the significant environmental benefits discussed above, contrary to the public interest.¹⁹ We therefore conclude that a stay is not warranted.

B. Duke's Mussel Relocation Plan

12. By order issued July 17, 2008,²⁰ the Commission staff approved Duke's plan to relocate the Appalachian elktoe mussel from immediately downstream of the Dillsboro Dam to suitable upstream habitat to prevent any negative impacts during dam removal

¹⁷ At least 60 days before starting any removal operations, Duke must file, for Commission approval, a blasting plan, public safety plan, emergency action plan, erosion and sediment control plan, site-specific final restoration plan, bat relocation plan, sediment management plan, fish stranding and monitoring plan, and a construction plan for a public boat launch and gravel parking area. The licensee must prepare these plans in consultation with various agencies, including FWS, the North Carolina Department of Environment and Natural Resources, North Carolina WRC, North Carolina Division of Water Resources, North Carolina DWQ, and Jackson County. To date, Duke has filed its project safety plan, fish stranding and monitoring plan, sediment management plan, bat relocation plan, and mussel relocation plan, which calls for the Appalachian elktoe mussel to be collected from the river reach immediately below the Dillsboro Dam and relocated to the first shoal area upstream of the mouth of Savannah Creek, in October 2008, when air and water temperatures are relatively cool and the relocated mussels would experience minimal stress.

¹⁸ In our April 22 Order, we revised the timing of project removal to allow demolition of the dam and powerhouse to occur between December 1 and March 31, and we revised the completion timeframes to require project removal completion by July 19, 2010 (within three years of issuance of the July 19 order), and post-removal monitoring by July 19, 2012.

¹⁹ Duke states that any delay in pre-removal activities would jeopardize its ability to comply with the required timelines leading to removal completion by July 19, 2010, and would cause Duke to incur the additional expense of approximately \$185,000 to undertake a second environmental sampling program, which it has already initiated. *See* Duke's Answer at 15.

²⁰ 124 FERC ¶ 62,050 (2008).

activities. Jackson County asks that we stay our approval of the plan until all surveys, studies, and assessments required for compliance with the Incidental Take Terms and Conditions have been conducted, because the results of those studies may raise issues that need to be resolved, including the possibility of further studies and environmental assessments.

13. FWS has identified mussel relocation as a reasonable and prudent measure to avoid or minimize incidental take of the endangered Appalachian elktoe mussel. The elktoe mussel will be helped, not hurt, by implementation of the licensee's relocation plan. Moreover, the relocation plan has been developed pursuant to the requirements of FWS, the entity with primary responsibility for protecting this species, and Jackson County points to no deficiencies in the plan. We therefore do not find a stay of the plan is justified by the possibility that additional studies or assessments may be needed. Should study results reveal such a need, adjustments in the relocation schedule can be considered and approved. Consequently, no irreparable harm will be suffered by denial of a stay.²¹

The Commission orders:

The motion for stay filed by Jackson County, North Carolina, in this proceeding on August 12, 2008, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²¹ Jackson County also contends that a stay should be issued until the Commission has acted on pending settlement agreements in the still pending relicensing proceedings in which, it asserts, the demolition and project removal of the Dillsboro Project will be used as mitigation for Duke's other projects in the river basin. We have rejected this argument before (*see* 123 FERC ¶ 61,069 at P 9) and see no reason to address it again.